GD NEWS

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July 2006 Issue

The proper response to a risk?

What the proper or reasonable response to a clear risk will be continues to bedevil the law of liability insurance.

In *Martin v The Trustees of the Roman Catholic Church of the Archdiocese of Sydney [2006]NSWCA 132 (29 May 2006)* a 14 year old schoolgirl was injured whilst taking part in a climbing activity at an adventure-style camp conducted by the school intended to "develop skills in coping with obstacles".

Briefly, the students were encouraged to try to climb to a wooden platform 3.8 metres above the ground by one of two ramps. One ramp had horizontal logs across it which acted like steps. The other ramp was smooth. Each was at about 60º to the horizontal. The plaintiff chose the smooth ramp and slipped from about 2 metres up and fell, breaking her leg. She sued the school for negligence and lost in the District Court.

The Court of Appeal unanimously allowed her appeal and awarded damages.

Although the result ultimately turned on its own facts, the Court said:

- the fact that 2 or 3 other girls had slipped on the ramp prior to the plaintiff indicated that there was a significant risk she would slip
- if the plaintiff slipped high up the ramp, there was a significant risk of injury
- the reasonable response to the foreseeable risk of injury from a fall high up the ramp was to give instructions as to what to do in such a case and to have properly instructed 'catchers' in place.

The school could not establish that it had told the plaintiff what to do in such a situation, nor that it had properly briefed other girls to act as 'catchers'. Accordingly, it was liable for a failure to properly instruct and supervise the plaintiff.

The case is illustrative of the importance in risk management and liability minimisation of:

- having in place systems which allow for safety measures to be adaptable to the particular circumstances
- responsible personnel having the skills and training to assess risk 'on the spot' and formulate an appropriate response to it.

The nature of risk of injury being fluid, the response to it must also be flexible.

Although the Court cautioned against excessive use of hind-sight in determining liability, the impression remains that the materialisation of a risk - especially with vulnerable plaintiffs (like children) - will often doom a defendant. It is a case, possibly, not of the bar getting higher, but of its height ever changing.

Invisible polish not an obvious risk

The New South Wales Court of Appeal has recently had the opportunity to consider what is - or perhaps what is not - an obvious risk, in the decision of *CG Maloney Pty Ltd t/as Bondi Hotel v Hutton-Potts and another*.

Diana Hutton-Potts allegedly sustained injury when she slipped and fell over on unbuffed polish at the Bondi Hotel. Hutton-Potts commenced proceedings against the hotel and the cleaning company. A cleaner was still cleaning nearby at the time of her fall. The evidence demonstrated that there was a warning sign which Hutton-Potts did not see. Perhaps it was obscured by the cleaner. At trial, the judge found in favour of Hutton-Potts but deducted 20% for contributory negligence. The trial judge was of the view that with a cleaner carrying out cleaning in the vicinity Hutton-Potts' attention should have been drawn to a possible hazard. It did not matter that she did not see the polish on the floor. In handing down judgment the trial judge did not consider the obvious risk provisions in the Civil Liability Act 2002. The trial judge found the

Inside

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hotel to be predominantly liable, finding the hotel liable for 80% of Hutton-Pott's damages and the cleaning company liable for 20% of the damages.

The hotel appealed arguing there was no negligence on the part of the hotel and that the warning sign was a sufficient response to the hotel's duty of care and even if the sign was not enough, the polish was an obvious risk and there was no duty to warn of this risk.

Essentially the provisions of the Civil Liability Act 2002 create a presumption that an injured person is aware of an obvious risk. A risk can be obvious even if it is not prominent, conspicuous or physically observable. A person is presumed to be aware of an obvious risk unless they prove on the balance of probabilities that they were not aware of the risk. As a consequence of the Civil Liability Act there is no duty to warn in relation to an obvious risk as the Act exonerates a defendant from a duty to warn about obvious risks.

In this case, the hotel sought to argue that the polish on the floor was an obvious risk. This argument was rejected by the Court of Appeal. The Court of Appeal decided that the test in determining if a risk is obvious is objective, but surrounding circumstances and personal characteristics, such as if the plaintiff is a child, should also be taken into account. In this case, the evidence from Hutton-Potts was that she simply overlooked the presence of the cleaner, or, if she did see him, did not appreciate that he was polishing the floor.

Justice Santow in the leading judgment commented:

"Section 5G of the Act makes clear that the presumption is rebuttable that a person who suffers harm from an obvious risk is presumed to have been aware of the risk of harm. It is rebutted if the person proves on the balance of probabilities that he or she was not aware of the risk. It is clear on the trial judge's reasoning that he was so satisfied and it was open to him on the evidence so to conclude."

In these circumstances, the Civil Liability Act did not assist the hotel. The hotel owed a duty to warn and in any event the duty went beyond a need to warn. Access to the area should have been prevented. The hotel's actions were not enough.

One of the Judges of the Court of Appeal commented that it was not surprising that the trial judge had not dealt with the obvious risk provisions; the polish was not readily visible and in these circumstances the argument required no further attention.

What is an obvious risk within the meaning of the *Civil Liability Act* will no doubt continue to trouble the courts, particularly where defendants believe their duty of care is satisfied by providing a warning.

No costs limitations for cross-claims

In New South Wales the Legal Profession Act 2004 places limitations on costs that can be recovered by a plaintiff if successful in legal proceedings and limitations on costs that can be recovered by a defendant who successfully defends a claim. Division 9 of the Legal Profession Act 2004 provides that if a plaintiff's damages do not exceed $100,000.00, then the plaintiff's maximum costs are fixed at 20% of the amount recovered, or $10,000.00, whichever is greater, plus limited disbursements (not including barrister's fees). Defendants that are successful defending a claim are subject to the same restrictions. These cost limitations were initially introduced in 2002 as part of amendments to the Legal Profession Act 1987 which coincided with the introduction of the Civil Liability Act. The costs provisions, along with the provisions which allow a Court to order a solicitor or barrister to personally pay costs if they act in proceedings without reasonable prospects of success, have resulted in a substantial reduction in litigation throughout NSW.

What is the situation when a cross claim is filed by or against a party? Is there any limitation on costs when a cross claim is successful or unsuccessful? The New South Wales Court of Appeal has recently considered this scenario in the decision of *Boylan Nominees Pty Limited v Williams Refrigeration Australia Pty Limited.*

Boylan Nominees were a defendant in District Court proceedings. Maria Sweeney had commenced proceedings in the District Court as a consequence of injuries sustained at a BP service station on 2 August 2000 when struck by a refrigerator door which had come off its hinges. Sweeney sued the proprietors of the service station and also Boylan Nominees who provided maintenance services for the refrigeration unit. Boylan Nominees cross claimed against Williams Refrigeration, the manufacturer, for contribution. Mrs Sweeney's claim ultimately proceeded to the High Court and in a judgment handed down on 16 May 2006 the High Court found in favour of Boylan Nominees.

The cross claim brought by Boylan Nominees was unsuccessful and Williams Refrigeration therefore sought costs from Boylan Nominees. Two question arose: was Williams Refrigeration a "defendant" within the meaning of section 198C(1) of the Legal Profession Act 1987 and, secondly, were the legal services provided by Williams Refrigeration legal team services "in connection with" the claim for personal injury damages. A positive answer to both questions would mean that the costs of a cross-claim are subject to the same limitations as the costs of a plaintiff and defendant.

This question was originally considered by a cost assessor who found that the cross claim did not have the same restrictions. An appeal to a Master of the Supreme Court was unsuccessful. Boylan Nominees therefore appealed to the Court of Appeal.

The majority of the Court of Appeal determined that the definition of "defendant" in section 198C does not include a cross defendant and

therefore there is no costs cap applicable to cross defendants. The Court also determined that the words "in connection with" do not extend the provisions to cover the costs of legal services provided to a person who an injured person had not made a claim against. The cap would however apply to costs incurred by a defendant who pursued a cross claim. The Court of Appeal was not unanimous in its decision. Two judges determined that the caps did not apply whilst one judge decided the costs limitations did apply to cross defendants and therefore the costs of a cross claim were subject to the same cost caps. The majority of the Court of Appeal has set the rules but will this be the end of the issue.

An interesting result. It seems an odd situation where a plaintiff and defendant's costs are capped but those of a cross defendant are not, as long as the cross defendant is not a defendant to proceedings brought by the plaintiff. The costs in cross claims will be capped for plaintiffs and defendants who have brought or are defending cross claims but not for others. The plaintiff's selection of defendant will determine the potential capping of costs. No doubt this will stir some defendants into action in their attempts to encourage plaintiffs to join all potential tortfeasors as defendants in proceedings.

If it is not your place of work there is no breach of the OH&S Act

On 3 September 1998 Jim Zaronias sustained fatal injuries and Michael David Papaianni sustained serious injuries when a wall at a construction site toppled and fell upon them.

A prosecution was brought under the OH&S Act against Mr Luke Tsougranis who was engaged by George Agapiou, the owner of the premises, to provide structural engineering advice, directions and drawings for use by persons engaged by the owner, for the conduct of certain works involving renovations to the existing structure and the addition of a new structure at the premises.

There was a free-standing double brick wall ("the wall") in the rear northern boundary of the premises which was not fully bonded into the cross wall at the rear of the front section of the premises to which it abutted and it was not a party wall fully bonded into the cross walls of the adjoining premises.

Works were carried out by Michael David Papaianni and Carl Mark Hamilton ("the builders"), and their employee Jim Zaronias at the premises, pursuant to the builders' contract with the owner, in reliance on the structural engineering advice, directions and drawings provided by Tsougranis.

WorkCover claimed Tsougranis had not investigated the depth of the base or structural integrity of the footings of the wall, had not made a detailed assessment of the structural integrity of the wall itself and had not provided any requirements in his design to provide appropriate temporary support for the wall.

Tsougranis was charged with a breach of the OH&S Act that provides
"Every employer shall ensure that persons not in the employer's employment are not exposed to risk to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work."

The prosecution was required to prove beyond reasonable doubt that the risk to persons not in the appellant's employment arose from "the conduct of his undertaking, namely, the provision of engineering advice, directions and drawings for use at the premises by the persons whilst they were at his place of work".

Was it a place of work for Tsougranis? No!

The Full Bench of the Industrial Commission dismissed the charge after an appeal from Tsougranis following his conviction.

The term "place of work" is defined in s 4 of the OH&S Act as "premises or any other place, where persons work" and "premises" is defined as:
(a) any land, building or part of any building;
(b) any vehicle, vessel or aircraft;
(c) any installation on land, on the bed of any waters or floating on any waters; and
(d) any tent or movable structure.

The Court must determine beyond reasonable doubt that the place in question was the "employer's place of work" at the time of the accident or when the breach of the OH&S Act occurred.

On the day of the accident Tsougranis had no employees at the site and he did not enter or leave the site on that day WorkCover contended that the work of Tsougranis continued on the site on the day of the accident even though he was not physically present, because his plans were still being used to construct the footings.

The Court noted "The legislation does not require Tsougranis to ensure the product of his work, his advice, directions and drawings, were devoid of hazard. No actual work was being performed or "being done" in the conduct of his undertaking at the site. In other words, Tsougranis was not giving advice, giving directions, or making drawings. The OH&S Act is directed to workplaces and does not impose an

obligation to ensure that the product of that work is free from hazard."

What is properly considered an "employer's place of work" for the purposes of the OH&S Act is a matter of fact determined by the circumstances of each case. The court noted "In our view, the mere fact that engineering plans were prepared by Tsougranis and those plans have ramifications for what work was to be done on the site, does not necessarily make the site the engineer's place of work.

The judgement of the President of the Court and Justice Staff held

"We do not consider that the charge under s 16 has been made out. The preparation and the existence of engineer's or engineering drawings in respect of a particular worksite do not necessarily result in the worksite becoming the place of work of the author of the drawings when the drawings are acted upon by builders on site. In some circumstances, the fact or existence of an engineer's or architect's drawings may assist to demonstrate that the worksite is the engineer's or architect's place of work where the engineer or architect undertakes the supervision or some supervision of the work. The fact that in this case Mr Tsougranis visited the site prior to the incident does not make it his place of work on 3 September 1998.

We conclude that the appellant is not guilty of the charge."

But there was more. Section 17 of the OH&S Act provides:
"Each person who has, to any extent, control of:
(a) non-domestic premises which have been made available to persons (not being the person's employees) as a place of work, or the means of access thereto or egress there from, or
(b) any plant or substance in any non-domestic premises which has been provided for the use or operation of persons at work (not being the person's employees),
shall ensure that the premises, the means of access thereto or egress there from or the plant or substance, as the case may be, are or is safe and without risks to health. "

The Full bench was asked to determine whether Tsougranis had breached section 17 of the Act.

The Full Bench when examining this issue examined an earlier decision of the Court and noted "In *McMillan Britton and Kell Pty Limited v WorkCover Authority of New South Wales* the Court considered a charge under section 17(1)(b) of the Act. In that case, the defendant, an engineer, provided advice to an engineering company in relation to work carried out on a particular site and the safety of plant equipment. The engineer provided incorrect advice about the safety of that plant equipment. The unsafe equipment collapsed and injured some people. The engineer contended that he gave his advice on 16 March 1994 and further advice on 21 May 1994. When the accident occurred on 6 July 1994, he no longer had any control over the plant or substance over which he had given advice. The prosecutor contended (at 477) that the engineer's submission "ignores the fact that the control exerted by the appellant to any extent did not arise until some act in reliance upon the admittedly erroneous advice" and that "it ignores the continuing nature of the obligation contractually assumed by the appellant"."

The Full Bench in the McMillan Brittan case held:

> "The answer to the problem, on our approach, requires determination as to whether the concept of "control" in s 17 comprehends a continuing liability to ensure safety beyond the actual giving of the advice. If it does, then the prosecution here is sustainable as being within time; if it does not, then the charge must be dismissed as being statute barred."

The Full Bench in the McMillan Brittan case also stated

> "Put another way, control must be shown to have been present on 6 July 1994 when the operative act or omission constituting the offence occurred."

In Tsougranis' Case at the time of the accident he was not present at the premises and the Court held he had no control at all over the premises or what was happening at the premises. The Court noted "He had not spoken to the builders or Mr Agapiou since 31 July 1998. Mr Papaianni's evidence was that Tsougranis was to be contacted by Mr Agapiou when the builders were ready for an inspection of the steel work. Mr Papaianni's evidence in the appeal proceedings is that he had never spoken to Tsougranis about the fact that there was to be an excavation in the rear of the premises. Tsougranis had no input into the activities being undertaken at the premises for the weeks prior to the accident. He had not been asked to provide any advice at any time after the work on the premises had commenced, nor had he provided any advice since the work on the premises had commenced. We therefore find that between 1 and 3 September 1998, the conduct of the appellant's undertaking had no real or substantial connection with the premises. We consider that the s 17 charge is therefore not made out."

A sensible outcome that gives engineers and experts some comfort but not without considerable angst for Mr Tsougranis.

Rogue actions of an employee do not add up to a breach of the OH&S Act

Section 8(2) of the NSW OH &S Act imposes the obligation on an employer to "ensure that people (other than the employees of the employer) are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work.

Mr Arthur MacKenzie was employed by Cardinal Project Services as a truck driver who was instructed by his employer to deliver a bin of bricks to a building waste facility operated by Collex Pty Ltd ("Collex") at the Botany site. MacKenzie arrived at the site and was handed a tip docket by an employee at the gatehouse operated by Collex. MacKenzie moved his truck, as instructed, to a location and waited in his truck, watching a front-end loader at work. The front-end loader was driven by an employee of Concrete Recyclers (Group) Pty Ltd ("Concrete Recyclers") and the front-end loader with the bucket of the loader in an upright position, collided with Mr MacKenzie's truck, causing severe injuries to Mr MacKenzie.

The building waste facility operated by Collex catered for the delivery of construction and demolition waste to the site for recycling. Collex would charge customers for using their facility to deliver construction and demolition waste based on the size of the load of waste. Concrete Recyclers provided sorting services at the site for Collex pursuant to an agreement.

Prior to the accident date, there had been discussions between Collex and Concrete Recyclers as to the employment of a yardman who would direct traffic into the loading/unloading area in conjunction with the loader operator. At the time of the accident, no such person had been employed in that position.

The gatehouse attendant was the supervisor of the site for Collex and Collex's activities on the site represented approximately 60 per cent of the volume of the work on the site and Concrete Recyclers activities represented, approximately 40 per cent.

WorkCover prosecuted Concrete Recyclers for a breach of the OH&S Act and the company elected to defend the case arguing it had no control of the site relying on expert evidence that indicated the incident was a result of the failure by Collex to implement an integrated traffic management plan.

In relation to the OH&S Act the court considered the nature of the liability imposed and held:

- The duty imposed on an employer to ensure the health, safety and welfare at work of employees is absolute.
- Such duty to ensure is to be construed as meaning to guarantee, secure or make certain.
- The duty so created is directed at obviating "risks" to safety at the workplace, even absent any actual incident causing injury; that is, where the circumstances create a potential danger to the health and safety of employees at the workplace.
- The duty cast on an employer is both preventive and remedial in nature and is not necessarily satisfied by carrying out what ought be done by a reasonable or prudent person in the circumstances.
- It is wrong in considering whether a breach has occurred to reason from the actual incident causing injury as the necessary detriment to safety as such an approach may well lead to a misunderstanding of the real facts on which a charge is based.
- An incident itself causing injury may well, and probably does, manifest the existence of a detriment to safety and will, no doubt, be some measure of the degree of severity of the detriment.
- It is necessary to establish both a relevant "failure" on the part of the employer and a causal relationship between the conduct of the employer and the consequent risk to health, safety or welfare of the employees.
- It is to the essential ingredients of the offence charged which one must attend by assessing the objective facts causing the detriment to safety and the causal connection therewith of the employer.
- The commission of an offence does not require the demonstration by the prosecutor that particular measures should have been taken to prevent the risk, although there can be no relevant failure by an employer in not taking steps to preclude a risk which was impossible to anticipate.
- There is no warrant for limiting the detriments to safety contemplated by the statutory duty to those which are reasonably foreseeable.
- Whilst relevant risks should not be merely speculative or unduly remote, measures which may have been taken to prevent any failure might be relevant to the statutory defence that either, firstly, it was not "reasonably practicable" to have complied with the duty or, secondly, that the commission of the offence was due to causes beyond the control of the employer and against the happening of which it was impracticable to make provision.
- The liability of an employer is to ensure that employees are not exposed to risks to health or safety while at work. The liability thus created according to the criminal standard of beyond a reasonable doubt makes out the offence; it is then for the defendant employer to prove to the civil standard on the probabilities the elements available under the defence.

In this case Concrete Recyclers was responsible for the operation of the tipping area and for instituting safe work procedures in that area. Concrete Recyclers' system related to the loading/unloading of trucks.

The Court also noted that "There can be no acceptable submission that, under the Act, in circumstances where there is a combined workforce involving employees from two employers and the site becomes the place of work for each employer, any assumption of control or authority, by one or other employer on that worksite, diminishes the statutory obligation placed upon each employer to ensure the safety of both its employees and others at its place of work. Therefore, there can be no significant diminution in the objective seriousness of these offences by any reliance as to a lack of control on site, although it is necessary to have regard to the specific culpabilities of each offender in assessing penalty. Whilst it is appropriate to have regard to the role played by other entities as part of a review of the total circumstances of a particular prosecution so as to evaluate the real culpability of a defendant, such factors cannot reduce the culpability of the defendant in the sense of apportioning the overall penalty. It is important to assess the nature and seriousness of the defendant's offence by reference to the actual contribution of the defendant to the relevant risk"

The court found that the elements of the offence had been established but Concrete Recyclers argued that it had a statutory defence to the prosecution as it was not reasonably practicable for Concrete Recyclers to comply with the provision, or the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision. This argument succeeded and the charge was dismissed.

When considering a statutory defence under the Act the Court noted "there is a balancing of the nature, likelihood and gravity of the risk to safety occasioning the offence with the costs, difficulty and trouble necessary to avert the risk. At one end of the scale, it could not be reasonably practicable to take precautions against a danger which could not have been known to be in existence. Similarly, if the happening of an event is not reasonably foreseeable then it will not generally be reasonably practicable to make provision against that event. At the other end of the scale, there will be cases, .. in which known or obvious risks to safety exist. In these circumstances, the defendant will not have established a defence under the Act where it was reasonably practicable to have complied with the Act by ensuring that persons were not exposed to those risks. This may be the case because no measures were reasonably available or because measures which were available were not reasonably practicable. .., the assessment of the reasonable practicability of those steps requires a balancing of the quantum of the risk with the sacrifice (in money, time and trouble) in adopting the measures necessary to avert the risk. In my view, where there is a known risk which entails the potential for serious injury to persons in the workplace, the defendant will generally have to demonstrate that the costs, difficulty or trouble occasioned by the measures significantly outweigh the risk. This must be done by reference to the charge as brought by the prosecutor."

The court noted "the risk occasioned by the presence of a truck entering the tipping area without the knowledge of the loader operator presented an obvious danger to both the loader operator and the driver of the truck. This risk had, in fact, been identified by the Concrete Recyclers and documented in January 2002. The first submission advanced by the defendant that was said to establish a defence, namely, that it was not reasonably practicable for the defendant to ensure the safety of persons like Mr MacKenzie, was that if anything could have been done to avoid the risk and the accident which is a reflection of it, it had to be done, based on all the evidence, by Collex." The court held that the sending of the truck into the area was beyond the control of Concrete Recyclers. The relevant causes of the risk/accident were the isolated act of atypical negligence of the loader driver and the atypical act of sending MacKenzie through to park his truck in the tipping area, without warning the loader operator.

A great result for Concrete Recyclers, and a lesson for all. An act of negligence by an employee does not necessarily result in a breach of the OH&S Act. A satisfactory system of work is required and if there is a rogue action by an employee outside the system of work then a defence to an OH&S prosecution can be established. In addition others may have control of a site that renders accidents on site beyond your control and in those circumstances you may also have a defence to an OH&S prosecution.

Latest Statistics from the NSW Workers Compensation Commission

The NSW Workers Compensation Commission has recently published the quarterly review for the period January to March 2006. The statistics make for interesting reading and indicate the overall level of litigated matters have declined in recent years. For example, the March 2006 quarter showed a 4% decrease in the amount of disputes lodged with the Commission as compared to March 2005, whilst at the same time there had been a slight increase in the finalisation of disputes. However, the statistics reveal that the type of issues in dispute have remained relatively stable since June 2003. Disputes for permanent impairment remain far and away the most significant area of dispute. Whilst there may be more than one issue in dispute when an Application is lodged with the Commission, disputes about permanent impairment comprise almost 80% of the matters lodged with the Commission.

Only 11% of matters were determined by an Arbitrator. This is consistent with the now defunct Compensation Court where about 10% of matters were determined by Judges. In the Commission, the vast majority of claims were either settled by agreement between the parties or the Applications were discontinued. The average time taken to resolve disputes (without appeal) currently is 133 days from the date of registration. 95% of matters are finalised within 39 weeks if there are no appeals lodged.

With respect to appeals, only 2% of the total determinations by Arbitrators were revoked or remitted back to an Arbitrator and only 9% of medical assessment appeals were revoked by the Medical Appeal Panel.

In relation to common law matters, over 112 new applications were received for mediation in the March quarter. The mediation process is the final step before a matter can be referred to the District Court for final determination. Of these 112 common law matters, nearly 75% were resolved in the mediation process.

The latest statistics highlight the declining trend in disputed workers compensation matters. With the recent legislative amendments requiring insurers to conduct a further review before matters can be disputed, it is likely the downward trend in matters being referred to the Commission will continue. The only exception would appear to be the number of common law matters being actively pursued. Even then it should be noted that the large majority of these are resolve through the Commission's mediation process without the further delay or expense of the matter proceeding to the District Court. The statistics also make it clear that appeals either from the decision of an Arbitrator or from Approved Medical Specialist (in relation to permanent impairment disputes) are relatively futile. One wonders whether the low success rate on appeal will lead legal practitioners to shy away from lodging appeals.

OH&S Snapshot

OH&S Dangers in the School

In late 2002, a fourteen year old Arthur Phillip High School student suffered a traumatic amputation of the top joint of her left index finger while operating a Supershear pedal guillotine during her school metal work class. As a result of the traumatic amputation the student was admitted to hospital and was absent from school for one week.

The New South Wales Department of Education & Training was prosecuted by WorkCover Authority of New South Wales for failing to provide appropriate guarding on the guillotine. The Department of Education pleaded guilty.

The student had injured herself while operating the guillotine from the rear while assisting another student to cut a piece of metal sheeting. The Department of Education submitted the guillotine was manufactured with a guard offering protection to its operation when used from the front only, and not the rear. The Department of Education submitted further that all students in the metal work class had received and read the OHS instructional booklet which included the instruction "*Be the only person using the machine at any one time".* There was however, no suggestion that this instruction had been explicitly brought to the attention of the students.

The Department of Education had been charged and found guilty of an offence arising out of similar circumstances in late 2000. In reaching its conclusion, the Commission took this into consideration and noted that given the similarity in the charges and the commonality of the factual circumstances, the offence was more serious. The Commission noted, that following the 2000 offence, the Department of Education distributed a number of OHS bulletins to all government schools identifying the dangers associated with the use of machinery by students in the school environment, but ultimately the Commission considered *"nothing seems to have been done"* to eliminate the risk, and considered the risk was highlighted by the *"vulnerability of young, inexperienced school children [exposed] to risks to safety arising from the operation of unguarded or inadequately guarded machinery".* In handing down its findings the Commission indicated the simplest way to eliminate the risk the machinery posed to students was for the Department of Education to remove all machinery which could not be adequately guarded.

Ultimately the Commission took into consideration the number of students in the control of the Department of Education, that being approximately 754,000 attending 2,237 schools and weighed it up against the relatively small number of previous prosecutions. The Commission also took into consideration the outlay of $409,000 by the Department of Education to adequately guard all machinery in its schools. The Commission found the Department of Education guilty and imposed a fine of $115,000.

Workplace Death Despite Substantial OH&S Strategies

A 22 year old storeman was killed as a result of fatal head injuries sustained while operating a forklift at an aerosol valve manufacture and assembly plant in mid 2002. As a result of the fatality the storeman's employer, Precision Valve Australia Pty Limited was prosecuted for a breach of the OH&S Act for failing to maintain a safe system of work for its employees in the operation of its forklifts. Precision Valve Australia pleaded guilty.

The accident occurred when the deceased and another storeman aged 24 were operating two forklifts on the warehouse floor of the manufacture and assembly plant. As the two storeman passed each other in their forklifts they stopped approximately 1.5m apart and had a conversation. Once the conversation finished, the 24 year old storeman moved his forklift forward approximately 1m and heard noise as the two forklifts passed each other. He stopped, looked out of the forklift and observed the deceased's head lodged between the two forklifts.

The agreed statement of facts tendered to the Court indicated the two forklifts involved in the accident had a blind spot behind the support holding up the roof on the forklifts. The evidence indicated the deceased's forklift was in the blind spot of the other forklift at the time of the accident. The Police Engineering Investigations Section carried out an examination of the forklifts and found them to have no mechanical defects or component failures.

Precision Valve Australia submitted to the Court they had in place a BT Operator's Manual which expressly warned against the operation of forklifts while having any part of the drivers body outside the operator's cage. On the evidence of Precision Valve Australia's Human Resources Manager, it transpired the BT Operator's Manual was left outside the supervisors office for employees to examine at their will and not directly given to them to read. The Court deemed this as being *"hardly a satisfactory attempt on any view to ensure that the procedure was brought to the attention of the workers"*.

In reaching its conclusion, the Court considered Precision Valve Australia did not have a safe system of work implemented in its warehouse which adequately conveyed to its employees the dangers associated with operating forklifts while having parts of the operators body were outside the protective cage. It did noted however, Precision Valve Australia had provided the deceased with instructional training and induction relating to general safety issues in the operation of forklifts throughout his traineeship, ensuring he underwent training modules entitled *"Operate a forklift", "Pick and Process Order"* and *"Follow OHS&S Procedures".* The Court also noted Precision Valve Australia had in place a myriad of general OHS policies and procedures which where dedicated to the safety of employees at the warehouse.

In reaching its decision the Court stated *"it is apparent from the evidence that [Precision Valve Australia] had in place prior to the offence an impressive safety system...the existence of such a system and its implementation….shows that [Precision Valve Australia] took its OHS obligations seriously".* The Court also considered Precision Valve Australia was a good Industrial Citizen citing its work in the community and their involvement with the Macarthur Workplace Learning Institute and its fund raising drives assisting the Tsunami Appeal, the Deaf and Blind Society, St Vincent De Paul and the Lions Club. The Court also noted Precision Valve Australia had outlaid $600,000 on an OHS safety upgrade since the accident and had no prior convictions. The Court imposed a fine of $110,000

New Cross Border Arrangements- Workers Compensation

As of 1 January 2006 the new cross border arrangements for Workers Compensation came into force. The purpose of the arrangements is to make it easier for employers to do business when their workers are temporarily working interstate. The aim is to avoid employers obtaining multiple workers compensation policies for their workers in different states.

The cross border provisions determine which jurisdiction employers should obtain insurance cover for their respective workers.

To determine in which jurisdiction employers are to obtain insurance the following three tests apply:

1. Consideration is to be given to the state in which the worker **usually works** in that employment. That is, determine where the worker spends the greatest proportion of their working time.

   Where a worker usually works is determined by the location where they spend the greatest proportion of their working time. One needs to ascertain the worker's history of employment with the employer and how long the working arrangement intended to last. It is also important to consider the intentions of the worker and employer in relation to the employment. Temporary arrangements of not longer than 6 months are not to be taken into account. The intentions of the employer and worker are relevant.

2. If no state can be identified by the first test the state in which the employee is **usually based** for the purposes of that employment will be the relevant jurisdiction. That is, if the employee spends periods of time which are comparable in more than one state, is there a single state where they more frequently report to in relation to their work.

   Factors to consider in determining where the worker is usually based include issues such as:

   - What is the work location specified in the contract of employment?
   - Where does the worker intend to collect materials, equipment and the like?
   - Where does the worker report to in relation to work?

3. If no state can be identified using the first two tests it is determined by the **employer's principal place of business**. This is most commonly their address registered on the Australian Business Register in connection with their ABN. This may also include the State registered on the Australian Securities and Investment Commission's Index or if the above do not apply, the employer's business mailing address.

Once the tests are applied the **State of Connection** can be identified. A worker can work temporarily for the same employer under the same term or contract of employment in another state or territory in Australia.

It is important to note the cross border provisions have been applied and introduced in Queensland, Victoria, Tasmania, Western Australia and the ACT and are yet to be introduced in South Australia and the Northern Territory. It is also important to note the arrangements do not mean every employer will only require one policy of insurance in one state for all their employees.

Pursuant to *Section 9AA* of the *Workers Compensation Act, 1987 (as amended)* compensation is only payable where a worker's employment is connected with New South Wales. If it can be determined the State of Connection is New South Wales an employer must be insured in the State under *Section 155* of the *Workers Compensation Act, 1987 (as amended).*

As New South Wales, Queensland, Victoria, WA, Tasmania and the ACT have commenced the cross border legislation, employees undertaking work in these jurisdictions are only required to be insured in the State to which they are connected. As South Australia and the Northern Territory are yet to commence this legislation, a worker who undertakes work and is injured in either of these two jurisdictions may be able to lodge a claim for compensation in that State even if the State is not their State of Connection.

What if no State of Connection can be determined? If no State of Connection can be determined using the tests a worker's employment can be connected with New South Wales if the worker is in the State when the injury happens. This is applicable only if the worker is not entitled to compensation for the injury under the laws of a place outside NSW.

If the injury is classified as a disease of gradual onset the State of Connection for the employer still applies. The laws of the worker's State of Connection will determine the employer who is responsible for payment of compensation. If it is established the injuries are related to a

previous employer, the test to determine the worker's State of Connection at that time should be applied and compensation will then be sought from the employer in the State of Connection considered liable.

It can be seen from the new cross border provisions an employer will need to be stringent in keeping accurate records in relation to their employees. Employers need to retain concise records relating to their workers contract of employment, time sheets, site agreements, industrial award information and things such as travel records or accommodation records. It is also important to provide evidence the employment situation was at least of 6 months duration. If it is found the State of Connection is not New South Wales the employer will need to prove they have insurance cover in the requisite state.

Penalties apply if an employer does not have the requisite cover in the State or Territory which is seen as the State of Connection.

New Right of Entry Rules for Union Officials: Does it Address The Real Issue!

WorkChoices introduced a number of new procedural steps which Union Officials must comply with regarding entering workplaces. Whether the new legislative changes will have any practically impact upon rouge union behaviour is questionable, particularly regarding the abuse process and lip service that has traditionally being associated with entry into the workplace without notice, simply on the grounds of "suspected Occupational Health and Safety breaches.

It is well known within the employer groups the unions have traditionally used the issue of safety as a back door mechanism to gain access and create disruption for purely industrial relation purposes and nothing else.

Whilst the reforms have made some inroads, it would appear they fail to address the "safety abuse" issue. With regards to right of entry for industrial issues under the reforms, the procedures have been tightened and these changes are pleasing, They can be summarised as follows.

Unions can enter certain workplaces to investigate a suspected breach of the Workplace Relations Act or to hold discussions with employees.

Unions may only enter a workplace to investigate a breach of an award or collective agreement if a member of the union is carrying out work at the premises and the suspected breach affects a union member.

Union officials must have a permit from the Australian Industrial Registrar to enter a workplace. The Registrar can only issue a permit if satisfied that the union official is a fit and proper person.

On site the Union Organiser must:

- hold a valid federal permit
- provide at least 24 hours written notice of entry*
- where entering to investigate a suspected breach, provide details of that breach
- only visit during working hours and hold discussions during meal times or other breaks
- show your permit and notice of entry on request.

If the Union Official does not meet these requirements they have no right of entry to the site.

Provided the union official is a federal permit holder they may enter a site to investigate, on reasonable grounds, a suspected breach of the Workplace Relations Act, an Australian Workplace Agreement (AWA), an award, collective agreement or an order of the Australian Industrial Relations Commission (AIRC), that is binding on the union or binding on an employee who is a member of your union.

Union Officials can hold discussions with employees if work is being done at the site by members of the union and perform inspections and functions under an occupational health and safety (OHS) law of a State or Territory, provided they hold a federal right of entry permit. The 24 hours written notice is not required if entry is under OHS law but they must have a real suspicion of a breach of the OHS Act and a breach that is one that may be subject to prosecution under the OHS Act.

This is where the abuse of right of entry exists, namely OHS entry issues and the reforms appear not to adequately address this.

What then are circumstances where the Union Official has no right of entry to your workplace?

There is no right of entry for a union official to enter a site to investigate a breach of an AWA unless the union receives a written request from the relevant employee for discussion purposes where all employees at the workplace are on AWAs. Also there is no right of entry for discussion purposes at a workplace covered by a non-union collective agreement.

A union official have specific rights once they are lawfully on site. In investigating suspected breaches they may inspect or view any relevant work, material, machinery or appliance, interview employees who are members or eligible members of the union about the suspected breach or require the employer to allow the union to inspect and make copies of relevant records of their members kept on the premises or accessible on a computer.

The Union Official may also serve a notice requiring the production of records at a later date. Once on site the employer can give reasonable requests about the rooms or areas the union official may use on the site for holding discussions and the route the union official should take to access those rooms or areas.

Whilst it is pleasing the new requirements under WorkChoices that Union Officials be of a "fit and proper person", there appears to be no real addressing of one of the most problematic issues dealing with union officials entering the workplace, namely under the guise of safety. It is difficult for employers to mount legal challenges regarding abuse by union officials on the grounds of safety entry and this will continue to be one of the most challenging issues employers will face, especially in industries where the expose to risks in the workplace are higher.

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